412

(8)

No. 05-1448

In The

# Supreme Court of the United States

JEFFREY H. BECK,
*Petitioner,*
v.
PACE INTERNATIONAL UNION, ET AL.,
*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND THE RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF THE PETITIONER


W. STEPHEN CANNON
RAYMOND C. FAY
*Counsel of Record*
LAURA C. FENTONMILLER
CONSTANTINE CANNON LLP
1627 I Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 204-3500

JAMES J. KEIGHTLEY
HAROLD J. ASHNER
KEIGHTLEY & ASHNER LLP
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 558-5150
*Counsel for Amici*

*Of Counsel:*

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337


March 5, 2007

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST ..... 1

STATEMENT OF THE CASE ..... 3

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 6

PBGC'S CONSISTENT REGULATORY TREATMENT OF DISTRIBUTION OF PLAN ASSETS IN A STANDARD TERMINATION CONFIRMS THAT THE MERGER OF A SINGLE-EMPLOYER PLAN INTO A MULTIEMPLOYER PLAN CANNOT BE A FORM OF STANDARD TERMINATION ..... 6

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

**Cases**

*Beck v. PACE Int'l Union*, 427 F.3d 668 (9th Cir. 2005) .. 4, 15

*Blessitt v. Retirement Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) ..... 8

*Boivin v. U.S. Airways, Inc.*, 446 F.3d 148 (D.C. Cir. 2006)... 8

*Bridgestone/Firestone, Inc. v. Pension Ben. Guar. Corp.*, 892 F.2d 105 (D.C. Cir. 1989) ..... 8

*Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995)..... 6

*Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) ..... 6

*Lockheed Corp. v. Spink*, 517 U.S. 882 (1996)..... 6

*Nachman Corp. v. PBGC*, 446 U.S. 359 (1980) ..... 8

**Statutes**

26 U.S.C. § 411(d)(6) ..... 9

29 U.S.C. § 1054(g) ..... 9

29 U.S.C. § 1341 ..... 4, 5, 7, 10

29 U.S.C. § 1341(a) ..... 13

29 U.S.C. § 1341(a)(2)..... 10

29 U.S.C. § 1341(b) ..... 4, 7

29 U.S.C. § 1341(b)(3)(A) ..... 4, 7, 8

29 U.S.C. § 1341(b)(3)(A)(ii) ..... 8, 15

29 U.S.C. § 1341(b)(3)(B) ..... 10

29 U.S.C. § 1344 ..... 7, 13, 14

29 U.S.C. § 1344(a) ..... 7

29 U.S.C. § 1350 ..... 7

Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub.L.No. 100-203, §§ 9301-9346, 101 Stat. 1330 ..... 8, 9

Single-Employer Pension Plan Amendments Act of 1986, Pub.L.No. 99-272, §§ 11001-11019, 100 Stat. 237 ..... 14

**Rules**

Supreme Court Rule 37 ..... 1

**Regulations**

29 C.F.R. § 4001.2 ..... 10

29 C.F.R. § 4041.23(b)(5) ..... 10

29 C.F.R. § 4041.27(a) ..... 10

29 C.F.R. § 4041.27(c) ..... 10

29 C.F.R. § 4041.27(d)(1) ..... 10

29 C.F.R. § 4041.29(a) ..... 10

29 C.F.R. § 4050.2 ..... 11

**Other Authorities**

41 Fed. Reg. 48504 (Nov. 3, 1976) ..... 12

46 Fed. Reg. 9532 (Jan. 28, 1981) ..... 12, 13

51 Fed. Reg. 44798 (Dec. 12, 1986) ..... 14

53 Fed. Reg. 1904 (Jan. 22, 1988) ..... 5, 10

62 Fed. Reg. 60424 (Nov. 7, 1997) ..... 11

Conference Report on H.R. 3545, Budget Reconciliation Act of 1987, H.R. Rep. No. 100-495, 100th Cong., 1st Sess ..... 9

Pension Benefit Guaranty Corporation, Standard Termination Filing Instructions, http://www.pbgc.gov/docs/500_instructions.pdf ..... 11

Pension Benefit Guaranty Corporation, Small Business Guide, http://www.pbgc.gov/docs/Small%20business%20guide.pdf ..... 12

Pension Benefit Guaranty Corporation, 2006 Annual Management Report, http://www.pbgc.gov/docs/PBGCAMR.pdf ..... 3

*Amici curiae* respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

## STATEMENT OF INTEREST

*Amici*, the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Retail Industry Leaders Association, are trade associations that collectively represent thousands of employers.

The Chamber of Commerce of the United States of America (the "Chamber") is a nonprofit corporation that is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents over three million businesses and organizations of every size, in every sector, and in every region of the United States. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the business community. The ability of its member organizations to provide and administer in a reasonable fashion employee benefits plans is of vital importance to the Chamber's member organizations.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active and

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters accompany this brief.

retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and other Federal laws. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

The Retail Industry Leaders Association ("RILA") is the world's leading alliance of fastest-growing and innovative retailers and their product and service suppliers. RILA members represent more than $1.5 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, and they employ millions of Americans.

The Chamber, ERIC, and RILA limit their *amicus* participation to significant cases in which they believe their discussion of the issues will advance arguments that will not be presented by the parties or by other *amici*. They have joined together to file this brief in support of Petitioners' Brief on the Merits because the Ninth Circuit's decision in this case misconstrues ERISA and attempts to alter fundamentally ERISA's provisions governing pension plan terminations--to the detriment of employers and plan participants and beneficiaries.

If allowed to stand, the Ninth Circuit's decision would expose employers, whether in or out of bankruptcy, to fiduciary liability for business decisions regarding matters, such as the creation, modification, or termination of an employee benefit plan, that this Court has ruled repeatedly are not subject to ERISA's fiduciary standards. In addition, the Ninth Circuit's decision would undermine employers' reliance on the longstanding interpretation and administration of ERISA's plan termination provisions by the Pension Benefit Guaranty

Corporation ("PBGC"), and would weaken the insurance protection that the PBGC provides to employees who participate in PBGC-insured plans. Although the number of single-employer defined benefit pension plans in the United States has declined over the past two decades, over 28,000 such plans remain, covering approximately 34 million participants and beneficiaries. Pension Benefit Guaranty Corporation, 2006 Annual Management Report, http://www.pbgc.gov/docs/PBGCAMR.pdf, at 9. As a result, the harm that the Ninth Circuit's decision in this case would inflict if its decision is upheld is of major consequence to a great many employers, plan participants, and beneficiaries.

## STATEMENT OF THE CASE

Crown Vantage and Crown Paper, operators of paper mills, filed for bankruptcy. Many of their 2,600 workers were represented by the PACE International Union. Members of Crown's board of directors served as trustees of the company's pension plans. The bankruptcy court viewed the continued existence of the pension plans as a stumbling block to confirmation of the bankruptcy reorganization plan.

Crown investigated the possibility of effecting a "standard termination" of the plans, whereby the benefits would be fully annuitized. The union proposed that the plans be merged into the PACE multiemployer pension fund. Crown's Board reviewed the annuity bids and terminated the plans through the purchase of an annuity from the Hartford. Therefore, the Board did not accept the alternate proposal to merge the plans.

The bankruptcy court ruled that, although termination of pension plans is a business decision not subject to ERISA's fiduciary duties, discretionary actions taken to implement that decision carry a fiduciary responsibility. The bankruptcy court concluded that merger with an ongoing plan is a method

of terminating plans and therefore a decision concerning merger is subject to ERISA's fiduciary obligations. The bankruptcy court then ruled that Crown violated its fiduciary duties to the plan participants because Crown did not make an intensive and scrupulous investigation of the possible merger. The Ninth Circuit affirmed on both grounds, finding that plan merger is a form of termination and that the implementation of the decision to terminate the plan is subject to ERISA's fiduciary obligations. *Beck v. PACE Int'l Union*, 427 F.3d 668 (9th Cir. 2005).

## SUMMARY OF ARGUMENT

The provision of ERISA at issue here, 29 U.S.C. § 1341(b)(3)(A), deals with the "final distribution of assets" when a defined benefit pension plan undergoes a "standard termination" governed by Section 1341(b). If a single-employer pension plan is terminated in a standard termination, ERISA requires the plan's assets to be distributed to provide the benefits that the terminating plan's participants and beneficiaries are entitled to under that plan, not merged into an ongoing multiemployer pension plan where the assets of the terminating plan can be used to pay benefits that have been or will be earned by participants in the multiemployer plan. The "final distribution of assets" provision states the methods whereby the plan administrator is to distribute plan assets to satisfy the requirement to "provide all benefit liabilities under the plan."

The PBGC's implementing regulations confirm that the final distribution of assets to provide "all benefit liabilities under the plan" in a standard termination under Section 1341 is accomplished in only one of two ways, either through the purchase of an irrevocable commitment from an insurer--an annuity contract--or, subject to limited exceptions not applicable here, through direct payments, such as lump sum

payments. Both of these forms of distribution of plan assets are inconsistent with the general merger of assets into a multiemployer plan that the Ninth Circuit erroneously believed was a permissible option in a standard termination.

The PBGC's regulations and regulatory interpretations have been consistent on this point since the current "final distribution of assets" provision was included in ERISA in 1987. PBGC then published a Notice of Revised Termination Rules summarizing the point that permeates the agency's standard termination implementing regulations and filing instructions, 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988):

> Therefore, in order to terminate in a standard termination, a plan will have to [1] purchase irrevocable commitments that preserve all benefits and benefit forms in effect on the date of termination or [2] pay lump sum benefits that include the value (as of the distribution date) of all such benefits.

In addition, prior to the enactment of the current standard termination provisions in Section 1341, the PBGC consistently regulated standard terminations and their predecessors to require, except in limited circumstances, distribution of benefits through the purchase of irrevocable commitments from an insurer. Thus, under both previous and current regulations, the PBGC uniformly has required the distribution of plan assets in a standard termination to be in the form of an irrevocable commitment or through immediate payment or delivery of benefits. Merger into a multiemployer plan never has been a permissible means of distributing plan assets in a standard termination.

## ARGUMENT

### PBGC'S CONSISTENT REGULATORY TREATMENT OF DISTRIBUTION OF PLAN ASSETS IN A STANDARD TERMINATION CONFIRMS THAT THE MERGER OF A SINGLE-EMPLOYER PLAN INTO A MULTIEMPLOYER PLAN CANNOT BE A FORM OF STANDARD TERMINATION

The Ninth Circuit's decision that petitioner breached its fiduciary duty turns on whether a single employer pension plan can be terminated under ERISA by merging that plan into a multiemployer plan. In deciding that such a merger is an alternative method of plan termination, the court of appeals badly misconstrued ERISA.

*Amici* agree with petitioner that the Ninth Circuit's decision undermines the basic distinction between settlor and fiduciary functions that this Court has recognized repeatedly, starting in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). The decision to terminate or amend a plan is a settlor function, not a fiduciary function and therefore is not subject to ERISA's fiduciary standards. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). This important principle requires reversal of the decision of the Ninth Circuit.

Equally important is the point that *amici* address in this brief: a plan merger is not a permissible method of terminating a defined benefit pension plan. If a plan cannot be terminated by merging it into another plan, then the employer in this case did not have the choice (between a merger and a termination) that, the Ninth Circuit mistakenly believed, required the application of ERISA's fiduciary standards. Petitioner's brief

addresses in detail how the language and structure of ERISA preclude merger into a multiemployer plan as a means of distribution in a standard termination. This brief focuses on how the PBGC's standard termination regulations and numerous regulatory pronouncements emphatically demonstrate the same point.

ERISA provides that the exclusive means for voluntarily terminating a single-employer defined benefit pension plan is the procedure set forth in 29 U.S.C. § 1341. Section 1341(b)(3)(A) provides that the final distribution of assets pursuant to a standard plan termination must be made "in accordance with section 1344." Section 1344 establishes a priority schedule for the allocation of plan assets among plan participants and beneficiaries.

Here the type of plan termination involved is a "standard termination," 29 U.S.C. § 1341(b). If a plan is terminated in a standard termination, ERISA requires the plan's assets to be distributed to provide the benefits that the terminating plan's participants and beneficiaries have earned under that plan, 29 U.S.C. § 1344(a), not merged into a multiemployer pension plan where the terminating plan's assets can be used to pay benefits that have been or will be earned by participants in the multiemployer plan. The "final distribution of assets" provision, 29 U.S.C. § 1341(b)(3)(A), identifies two methods that the plan administrator can use to distribute plan assets that have been allocated in accordance with Section 1344:

> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities

> under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

As is made clear by the PBGC's implementing regulations, the provision of "all benefit liabilities under the plan" in a standard termination is accomplished either through the purchase of an irrevocable commitment from an insurer--an annuity contract--or (subject to limited exceptions not applicable here) through direct payments, such as lump sum payments. The question centers on the reach of the statutory provision in 29 U.S.C. § 1341(b)(3)(A)(ii), which allows a plan administrator who does not purchase an annuity to "otherwise fully provide all benefit liabilities under the plan" "in accordance with the provisions of the plan and any applicable regulations." As shown below, merger into a multiemployer plan is not a method of satisfying this option in a standard termination.

Respondents have argued that the views of the PBGC in opposing mergers as a form of plan termination are views asserted for the first time in this litigation. To the contrary, those views reflect what the PBGC's implementing regulations, promulgated under the notice-and-comment procedures of the Administrative Procedure Act, have long required. The PBGC's regulations are entitled to great judicial deference. *Nachman Corp. v. PBGC*, 446 U.S. 359, 373-74 (1980); *see Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154, 157 (D.C. Cir. 2006); *Bridgestone/Firestone, Inc. v. Pension Ben. Guar. Corp.*, 892 F.2d 105, 110 (D.C. Cir. 1989); *Blessitt v. Retirement Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164, 1177 (11th Cir. 1988).

The language in 29 U.S.C. §1341(b)(3)(A) that is at issue in this case has been in effect since enactment of the Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub.L.No. 100-203, §§ 9301-9346, 101 Stat. 1330 ("PPA"), which altered the rules governing standard terminations, primarily by increasing the benefits that are protected in a standard termination. Shortly after PPA was enacted, the PBGC made clear that the *only* alternative to purchasing an irrevocable commitment from an insurer is the payment of a lump sum amount that reflects the present value of the participant's benefits, not merging the plan into a multiemployer plan:

> The major change in the law with respect to standard terminations is the increase in plan benefits that must be *paid* in order for a plan to terminate in a standard termination. The prior rule that a plan be able to discharge all benefit commitments under the plan has been replaced by the requirement that a plan pay all "benefit liabilities" under the plan (in section 9313(a)). The term "benefit liabilities" is synonymous with pre-PPA termination liability and includes all fixed and contingent liabilities to plan participants and beneficiaries, including liability for benefits in effect on the date of termination that are not protected under section 411(d)(6) of the Internal Revenue Code of 1986 or section 204(g) of ERISA. (Conference Report on H.R. 3545, Budget Reconciliation Act of 1987, H.R. Rep. No. 100-495, 100th Cong., 1st Sess.) *Therefore, in order to terminate in a standard termination, a plan will have to purchase irrevocable commitments that preserve all benefits and benefit forms in effect on the date of termination or pay lump sum*

> *benefits that include the value (as of the distribution date) of all such benefits.*

53 Fed. Reg. 1904, 1905 (Jan. 22, 1988) (Notice of Revised Termination Rules) (emphasis added).

Section 1341 contains various deadlines for actions that a plan administrator must take when implementing a standard termination, starting with the initial notice to the PBGC and affected parties of the intent to terminate, 29 U.S.C. § 1341(a)(2), through the post-distribution certification, 29 U.S.C. § 1341(b)(3)(B). PBGC's implementing regulations define when a "distribution" occurs in a standard termination. The term "distribution date" is used in the PBGC's standard termination regulations for various purposes, including to set the time limit for the "notice of annuity information" that must be provided to "each affected party entitled to plan benefit other than an affected party whose plan benefits will be distributed in the form of a nonconsensual lump sum," *see* 29 C.F.R. §§ 4041.23(b)(5), .27(a), (c), (d)(1), as well as the time limit for filing the "post-distribution certification" with the PBGC, *see* 29 C.F.R. § 4041.29(a).

The PBGC's regulatory definition of "distribution date" does not allow a plan merger to be used to distribute benefits in a standard termination. Putting aside the special provision for "missing participants," the only distribution options are annuity purchases and immediate delivery of benefit payments, neither of which occurs in a plan merger, 29 C.F.R. § 4001.2 (emphasis added):

> Distribution date means:
> (1) Except as provided in paragraph (2) --
> (i) For benefits provided through the purchase of irrevocable commitments, the date on which

> the obligation to provide the benefits passes from the plan to the insurer; and
> (ii) For benefits provided other than through the purchase of irrevocable commitments, the date on which the *benefits are delivered to* the participant or beneficiary (or to another plan or benefit arrangement or other recipient authorized by the participant or beneficiary in accordance with applicable law and regulations) *personally or by deposit with a mail or courier service* (as evidenced by a postmark or written receipt); or
> (2) The deemed distribution date (as defined in § 4050.2) in the case of a designated benefit paid to the PBGC in accordance with part 4050 of this chapter (dealing with missing participants).

Moreover, the PBGC has issued "Standard Termination Filing Instructions" to implement its standard termination regulations. The pertinent language has been in effect since the version the PBGC issued shortly after it revised those regulations in 1997, 62 Fed. Reg. 60424 (Nov. 7, 1997). Those instructions, which are referenced throughout the standard termination regulations, reinforce the structure of a standard termination distribution as excluding the possibility of merging plan assets into another plan, http://www.pbgc.gov/docs/500_instructions.pdf, at 14:

> Except for Missing Participants (see section II.H.5), each participant must be offered all optional forms of benefits for which he or she is eligible under the terms of the plan. Plan benefits may be distributed in a form other than an annuity (*e.g.*, an immediate lump sum) only if the plan provides for such a distribution and

> (1) the participant elects the alternative form in writing, with the written consent of his or her spouse, or (2) for participants not already in pay status, the present value of the participant's benefit (valued in accordance with the rules described under "Valuation of Other Benefits" in the instructions to item 6 of Schedule EA-S), is at or below the plan's de minimis cashout level, which may not exceed $5,000.
>
> . . .
>
> If plan benefits are not payable in an optional form under the conditions described above, plan benefits must be distributed by the purchase from an insurer of an annuity contract that is an irrevocable commitment.

In the same vein, in its Small Business Guide (October 1998), the PBGC explained the standard termination process to the regulated small employer community. In the section on "[f]orm of distribution," PBGC stated as follows: "Unless you pay in a lump sum, you must distribute the plan assets in the form of a single-premium, nonsurrenderable annuity contract from an insurer."
http://www.pbgc.gov/docs/Small%20business%20guide.pdf, at 17.

The PBGC's post-PPA interpretation of the distribution rules as requiring either the purchase of an irrevocable commitment or the immediate distribution of lump-sum benefits, subject only to limited exceptions that leave no room for a merger into a multiemployer plan, is entirely consistent with its pre-PPA interpretations.

Shortly after ERISA was enacted, in a 1976 proposed rule, 41 Fed. Reg. 48504 (Nov. 3, 1976), and in a 1981 final rule, 46 Fed. Reg. 9532 (Jan. 28, 1981), the PBGC conducted a

rulemaking proceeding to address how it would determine whether a terminating plan was a "sufficient plan" (then requiring satisfaction only of all *guaranteed* benefits rather than, as now in a "standard termination," of all "benefit liabilities") and, if so, how such a plan could go about distributing its assets upon plan termination. At that time, the statute provided that the plan administrator, upon receipt of a "notice of sufficiency" from the PBGC, "may proceed with the termination of the plan in a manner consistent with [Title IV of ERISA]," 29 U.S.C. § 1341(a), and made no mention of the purchase of "irrevocable commitments" or of other means of distribution.

The PBGC decided in this rulemaking to require that a participant with a benefit payable as an annuity receive that benefit as an annuity under such a terminating "sufficient" plan, subject to specified exceptions only for certain *de minimis* benefits and for alternative forms (primarily consensual lump sums) that were (consistent with plan terms) *elected by the participant*. So as "[t]o ensure the timely and uninterrupted payment of benefits required to be provided in annuity form," the PBGC required that such annuity benefits be distributed through purchase of irrevocable commitments from an insurer (except in limited circumstances where the PBGC itself would provide certain early retirement benefits under a provision that is no longer in effect). This interpretation, like the PBGC's current interpretation, would preclude merger into a multiemployer plan as a permissible means of distribution.

In explaining why the plan administrator could not effect the distribution by simply paying an annuity from the plan's trust, the PBGC noted how such a structure could violate the allocation scheme in ERISA Section 4044, 29 U.S.C. § 1344. This explanation, too, illustrates why a plan merger is inconsistent with a standard termination, 46 Fed. Reg. at 9534:

> [T]he PBGC notes that continuation of the trust of a terminated plan could result in a violation of the allocation rules set forth in section 4044 of the Act. Those rules establish six categories of plan benefits and require that assets be allocated to benefits in the higher priority categories before the assests [sic] are allocated to benefits in lower priority categories. If a plan's trust were continued, older participants with benefits in priority category 5 that were funded on the allocation date might retire and begin receiving their benefits before all benefits in higher priority categories payable to younger participants has [sic] been paid. If the trust should then suffer losses, there might not be sufficient assets to pay the benefits in the higher priority categories. Thus, since the continuation of the trust of a terminated plan would not ensure payment of benefits in the manner required by section 4044 of the Act, the PBGC will not permit the annuity requirement to be satisfied by continuation of the trust.

Shortly after ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub.L.No. 99-272, §§ 11001-11019, 100 Stat. 237 ("SEPPAA") to create the concept of a "standard termination" (which required satisfaction of all "benefit commitments"), PBGC stated its interpretation that "SEPPAA . . . did not alter . . . . the rules relating to the distribution by the plan administrator of benefits payable under a terminated single-employer plan," and that, "[a]lthough much of the PBGC's sufficiency regulation is inapplicable to the new procedures, the rules therein continue to govern the final distribution of assets in a plan terminating under . . . a standard termination . . . ." 51 Fed. Reg. 44798 (Dec. 12, 1986). And, as explained above, the PBGC's post-

PPA interpretation continued to preclude merger into a multiemployer plans as a permissible means of distribution. Clearly, the views expressed by the PBGC are not, as respondents claim, opinions stated for the first time in an *amicus* brief.

The foregoing statutory and regulatory provisions and regulatory and administrative history demonstrate that the Ninth Circuit plainly was in error in stating that "distribution" is "not expressly defined in either ERISA or in [PBGC's] implementing regulations." *Beck*, 427 F.3d at 676. The Ninth Circuit failed to look to the regulatory definition of "distribution date," which (except in the case of a missing participant) allows benefits to be paid only by purchasing irrevocable commitments from an insurer or by making payments "delivered...personally or by...mail or courier," or to the many other clear indications in the PBGC's regulations and statements that limit the means of distribution in a standard termination. Instead, the court of appeals relied on dictionary definitions of "distribute" to support its mistaken view that those definitions "do not support the exclusion of mergers into multiemployer plans as a means of termination." *Id.* The PBGC's rules, by contrast, limit what the Ninth Circuit called the "alternative means," *id.* at 675, in 29 U.S.C. § 1341(b)(3)(A)(ii) ("otherwise fully provide all benefit liabilities under the plan") to distributions to missing participants, which are not at issue here, and to other payments that are immediately "delivered." A merger into a multiemployer plan--which might significantly dilute the security previously provided to plan participants by the assets of the terminating plan--is not a permissible means of distributing benefits in a standard termination.

## CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

March 5, 2007

Respectfully submitted,

*Of Counsel:*

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

W. STEPHEN CANNON
RAYMOND C. FAY
LAURA C. FENTONMILLER
CONSTANTINE CANNON LLP
1627 I Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 204-3500

JAMES J. KEIGHTLEY
HAROLD J. ASHNER
KEIGHTLEY & ASHNER LLP
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 558-5150

*Counsel for Amici the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Retail Industry Leaders Association*